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Supreme Court, U.S.
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No. 10-604

In the

Supreme Court of the United States

VICTOR MOSELEY and CATHY MOSELEY
d/b/a VICTOR'S SECRET, VICTOR'S LITTLE SECRET,
Petitioners,

v.

V SECRET CATALOGUE, INC.,
VICTORIA'S SECRET STORES, INC.,
and VICTORIA'S SECRET CATALOGUE, INC.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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November 1, 2010

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QUESTIONS PRESENTED FOR REVIEW

In April, 2002, Petitioners' request for certiorari was granted to interpret the language of the Federal Trademark Dilution Act and to give relief to Petitioners. Since that time congress passed into law the Trademark Dilution Revision Act of 2006. Four years have passed and the inferior Courts are again in a quandary in interpreting the language of the now TDRA. Being vexed twice, Petitioners respectfully request the service of this Court again. This Court's interpretation of the statutory language of the Trademark Dilution Revision Act will bring consistency and fairness to a very important Federal statute, saving judicial time and money.

1.

Whether the plain meaning of the definition of dilution by tarnishment, an association arising from the similarity between a mark or trade name and a famous mark "That harms the reputation of the famous mark," creates a rebuttable presumption or inference, requiring the owner of a new mark, the burden of coming forward with evidence that there is no likelihood or probability of tarnishment, or requiring the famous mark, to provide evidence that the new mark harms the reputation of the famous mark?

2.

Does the plain language of Section 43 of the Trademark Act of 1946 (15 U.S.C. § 1125) subsection (c) forbid its application to cases prior to its enactment?

3.

Does the separation of powers forbid Congress from legislatively overruling this case, and did the inferior courts err by following that reasoning, ignoring the mandate of the United States Supreme Court for four years, causing Petitioners to litigate this case again on the same claim, and issue, violating Petitioners' fifth amendment rights to due process?

4.

How semantically similar must a trademark be before it invokes a violation of the TDRA?

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OPINIONS BELOW

The decision of the Sixth Circuit is reported at 605 F.3d 382 (6th Cir. 2010) and is reproduced in the Appendix ("App.") herein at 1a-30a. The decision of the U.S. District Court for the Western District of Kentucky is reported at 558 F. Supp. 2d 734 (W.D. Ky 2008) and is reproduced at App. 31a-67a. The court of appeals order denying the petition for rehearing en banc is not reported. The court of appeals order denying rehearing is reproduced at App. 68a-70a.

JURISDICTION

The judgment of the Court of Appeals was entered on May 19, 2010 App., infra, 1a. The court of appeals denied a timely petition for rehearing en banc on August 5, 2010. App., infra, 68a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Lanham Act Section 43(c)(1), 15 U.S.C. § 1125(c)(1) provides, in relevant part:

> Subject to the principles of equity, the owner of a famous mark that is distinctive, inherently or through acquired distinctiveness, shall be entitled to an injunction against another person who, at any time after the owner's mark has become famous, commences use of a mark or trade name in commerce that is likely to cause dilution by blurring or dilution by tarnishment of the famous mark, regardless of the presence or absence of actual or likely confusion, of competition, or of actual economic injury.

Lanham Act Section 43(c)(2)(c), 15 U.S.C. § 1125(c)(2)(c) provides, in relevant part:

> For purposes of paragraph (1), 'dilution by tarnishment' is association arising from the similarity between a mark or trade name and a famous mark that harms the reputation of the famous mark.

STATEMENT OF THE CASE

This case has climbed the appellate ladder to the highest court in the land and was adjudicated, only to climb back down the ladder to be knocked off. It has now climbed back up that ladder and is knocking on the doors of the Supreme Court of the United States once more.

On February 7, 1998, petitioners Victor and Cathy Moseley opened a store called "Victor's Secret" in Elizabethtown, Ky.

On February 25, 1998, counsel for Respondents, Victoria's Secret (collectively "Victoria's Secret") sent the Moseleys a cease-and-desist letter alleging that the use of the name "Victor's Secret" was "likely to cause confusion." The Moseleys contacted the Respondents' counsel, Matt Lombard, and requested a copy of their logo and marks. After several phone calls and faxes back and forth, on or about March 3, 1998, Mr. Moseley changed the name of his store. He was under the impression from Respondents' counsel, that changing the name to "Victor's Little Secret" with a pair of pursed lips and finger "shhh" logo in the middle, and a motto, "Everything For Romantic Encounters" underneath, would satisfy their concerns.

After going through the expense and time to make these changes, on March 23, 1998, Mr. Moseley received another letter from Victoria's Secret counsel, wanting photographs, lists of products sold, samples of merchandise, and a host of other demands. Not until Mr. Moseley refused to comply with what he deemed unreasonable requests did respondents decide to file suit.

On June 22, 1998, Respondents filed suit in the United States District Court for the Western District Of Kentucky. Their complaint included trademark infringement, unfair competition, and trademark dilution under the Federal Trademark Dilution Act. After discovery, both parties moved for summary judgment. The District Court held that based on the facts of record, no likelihood of confusion existed as a matter of law. On that basis, all Respondents' claims were dismissed, except the FTDA claim. In concluding that no likelihood of confusion existed, the District Court held that when viewed in context, little similarity exists between "Victor's Little Secret" and "Victoria's Secret." However, the Court went on to hold that "Victor's Little Secret" was "sufficiently similar" to "Victoria's Secret" to cause dilution by both "blurring and "tarnishment "The District Court enjoined Petitioners from using the designation "Victor's Little Secret" or any similar mark.

Petitioners appealed the District Courts decision to the Court of Appeals for the Sixth Circuit. The respondents did not cross-appeal. The Sixth Circuit panel affirmed the injunction based on the District Courts findings of dilution by blurring and tarnishment.

Petitioners filed a timely petition for rehearing en banc. The court declined to even take a vote on whether to rehear the case. The three judge panel declined to reconsider its opinion and issued an order denying rehearing on October 4, 2001.

Petitioners then filed a Petition for Writ Of Certiorari, which was granted and argued on November 12, 2002 and decided March 4, 2003. (123 S. Ct. 1115 (2003)) with a unanimous decision in favor of the Petitioners. The Court found that there was a complete absence of evidence of any lessening of the "Victoria's Secret" mark's capacity to identify and distinguish goods or services sold in Victoria's Secret stores or advertised in its catalogs. The court went on to explain that the officer who saw the ad directed his offense entirely at the Petitioners not the Respondents. That any difficulties of proof that may be entailed in demonstrating actual dilution are not an acceptable reason for dispensing with proof of an essential element of a statutory violation. The case was reversed and remanded to the Sixth Circuit Court for further proceedings consistent with that decision. The Sixth Circuit received the judgment of the United States Supreme Court on April 7, 2003. Consistent with the decision of the Supreme Court, Petitioners moved the Circuit Court to vacate the injunction and to dismiss the complaint in its entirety. Respondents filed a response memorandum and Petitioners filed a reply memorandum. The Circuit Court held this case in informal abeyance for four years. After the TDRA was signed into law on October 6, 2006, the Sixth Circuit on July 26, 2007, (App., infra, 70a, 71a) finally remanded this case back to the District Court for further proceedings consistent with the Supreme

Court's decision in *Moseley d/b/a Victor's Little Secret v. V Secret Catalogue Inc.*, 123 S. Ct. 1115 (2003).

The Petitioners and the Respondents filed cross summary judgment motions on the issue of dilution in the District Court for the Western District of Kentucky. The District Court granted Summary Judgment in favor of Respondent (Victoria's Secret) and issued and granted a final and permanent injunction against Petitioners (Moseley) on May 19, 2008 (App., infra, 31a-67a). Notice of appeal was filed on June 19, 2008.

On May 19, 2010, the Sixth Circuit Court affirmed the decision of the District Court with a 2-1 spiit. Circuit Judge J. Merritt delivered the opinion (App., infra, 2a-28a), Circuit Judge J. Gibbons delivered a separate concurring opinion, with the exception of one small quibble, and Circuit Judge J. Moore delivered a separate dissenting opinion, because she believed that Victoria's Secret had not met its burden to show that "Victor's Little Secret" is likely to dilute the famous mark by way of tarnishment (App., infra, 18a-28a).

Petitioners filed a timely petition for rehearing en banc. The Respondents filed opposition to petition for rehearing. The petition for rehearing en banc, was circulated and the court declined to take a vote. After being reviewed by the original three Judge panel the petition was denied. Judge Moore would grant rehearing for the reasons stated in her dissent (App., infra, 68, 69a) The petition was denied on August 5, 2010.

REASONS FOR GRANTING THE PETITION

1. The opinion of the Sixth Circuit below conflicts with three or more circuit courts.

This Court heard and then decided this case on March 4, 2003, under the provisions of the Federal Trademark Dilution Act ("FTDA"). On October 6, 2006, the Trademark Dilution Revision Act ("TDRA") was signed into law.

Among the changes congress made was the phrase "causes dilution" in the FTDA, to "likely to cause dilution" in the new TDRA. The Sixth Circuit in their opinion (App., infra, 5a, 12a) somehow reads into this change that it creates a rebuttable presumption, or a strong inference, shifting to the owner of a new mark, the burden of coming forward with evidence that there is no likelihood or probability of tarnishment. The circuit court notes (App., infra, 12a) that the Committee Report seeks to "reduce" the "burden" of evidentiary production on the trademark holder. The court totally ignores the word "reduce" (to make smaller). The court goes on to explain its reasoning by saying that the burden-of-proof problem, the developing case law, and the Restatement (third) of Trademarks in § 25 (particularly subsection g) should now be interpreted, we think, to create a kind of rebuttable presumption. In fact, there is nothing in the statutory language of the TDRA. that would negate the responsibility to the junior mark, the burden of coming forward with evidence that there is no likelihood or probability of tarnishment. The revisions of the FTDA. were to reduce the evidentiary proof required of the famous mark, not to obliterate the famous marks obligation to prove the junior mark harms their

reputation. *See KP Permanent Make Up, Inc. v. Lasting Impression I, Inc. et al.*, 543 U.S. 111 (2004), on likelihood of confusion. Logically, the same rationale would apply on a likelihood of tarnishment claim. The Circuit Court goes on to explain, (App., infra, 13a), that they agree that the tarnishing effect of the Moseley's mark is somewhat speculative, but they have no evidence to overcome the strong inference created by case law, the Restatement, and congressional dissatisfaction with the burden of proof used in this case in the Supreme Court. The new law seems designed to protect trademarks from any unfavorable sexual association. Thus, any new mark with a lewd or offensive-to-some sexual association raises a strong inference of tarnishment. Hypothetically, if Petitioners' mark were the famous mark, and Respondents' mark were the junior mark, Petitioners would have a claim against Respondents, (simply because it is sex related and offensive to some) because they sale and promote sexy lingerie, crotchless panties, and other related items. Surely if this was the intent of Congress they would have included something in the statutory language of the TDRA. The plain language of 15 U.S.C. § 1125(c)(2)(c), "dilution by tarnishment" is association arising from the similarity between a mark or trade name and a famous mark "that harms the reputation of a famous mark" requires an actual showing of evidence, by the Respondents, that Petitioners' mark harms their reputation. The Circuit Court relies on eight federal cases (App., infra. 11a) for their opinion. This case differs in that Petitioners have never used Respondents' mark in any way. Petitioners have only used a common word of the English language in conjunction with Petitioners' first name, which may be semantically similar in spelling but is totally different. Further, Petitioners would be

hard pressed to express their reasoning any better than Judge Moore. *See* (App., infra, 26a). The Petitioners also agree with Sixth Circuit Judge Karen Nelson Moore, in her dissent (App., infra, 20a, 21a) who seems to follow the rational of the Second Circuit and would be in align with the Seventh and Fourth Circuit. The Second Circuit noted in *Starbucks Corp. v. Wolfe's Borough Coffee, Inc.*, 588 F.3d 97 (2d Cir. 2009) that a consumer may associate a negative-sounding junior mark with a famous mark says little of whether the consumer views the junior mark as harming the reputation of the famous mark. The more relevant question, for purposes of tarnishment, would have been how a hypothetical coffee [with a negative-sounding name] would affect the positive impressions about the coffee sold by Starbucks. *Starbucks Corp.*, 588 F.3d at 110.

Following the same rationale, the Seventh Circuit in *AutoZone v. Strick*, 543 F.3d 923 (7th Cir. 2008) (no. 07-2136), the court found that AutoZone's dilution claim still failed because AutoZone made no attempt to show actual or likely dilution of its mark.

The Fourth Circuit, in *Malletier v. Haute Diggity Dog*, 507 F.3d 252 (4th Cir. 2007) (no. 06-2267), would not even discuss Louis Vuitton's claim on tarnishment by dilution, stating, "To establish its claim for dilution by tarnishment, LVM must show, in lieu of blurring, that Haute Diggity Dog's use of the "Chewy Vuiton" mark on dog toys harms the reputation of the LOUIS VUITTON mark and LVM's other marks." LVM has, however, provided no record support for its assertion. After 12 years, and even if Respondents' newly minted evidence is considered, Respondents have failed to produce any probative evidence that Petitioners' use of

the mark "Victor's Little Secret" would harm their reputation under the FTDA or the TDRA standards.

2. The decision below conflicts directly with that of the United States Supreme Court and the plain language of the TDRA.

Respondents argue that legislative history demands the TDRA to be applied retroactive. Respondents rely on a statement of Anne Gundelfinger, President, of the International Trademark Association during a Hearing on H.R. 683 Before the H. Comm. On the Judiciary, 109th Cong. 17 (2005) Anne Gundelfinger testified that conduct arising before the enactment of H.R. 683 should not be penalized with compensatory damages because such damages as found in Landgraf are quintessentially backward looking. *Id.* (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 282 (1994)). She went on to state that the TDRA, however, should be applied to prospective injunctive relief. *Id.* No contravening testimony on the topic was given nor were there any comments from the Judiciary Committee on the subject. The Respondents claim that the legislative history therefore is completely consistent with every court that considered the issue that the TDRA applies to "pending" cases seeking injunctive relief.

The testimony of Ms. Gundelfinger is nothing more than her opinion. That there were no comments from the Judiciary Committee says little of the Committee's intent in drafting the TDRA. In fact the TDRA is not to be applied to cases prior to its enactment.

Despite the fact that the District and Circuit Courts are applying the TDRA to pending cases, if one

looks at the plain language it is clear that throughout the entire Trademark Act of 1946, Congress uses the term subsection to describe an entire portion of a section, they use the term paragraph to reference a portion of a subsection, and they use the term subparagraph to describe a portion of a paragraph. The point is that to understand the language one must look at all of Section 43 § 1125, False designations of origin and false descriptions forbidden. (App., infra, 72a). In revising the FTDA with [H.R. 683] congress states, Section 43 of the Trademark Act of 1946 (15 U.S.C. § 1125) is amended– (1) by striking SUBSECTION (c) [H.R.683) goes on (in brief) 15 U.S.C. § 1125 (c)(1) SUBJECT to THE PRINCIPLES OF EQUITY, injunctive relief by dilution, by blurring and dilution by tarnishment. Congress also uses, "COMMENCE USE," (continuing) 15 U.S.C. § 1125(c)(5) In an action brought under this SUBSECTION (referring to subsection (c) in its entirety) the owner of the famous mark shall be entitled to injunctive relief as set forth in section 34. The owner of a famous mark shall also be entitled to remedies set forth in sections 35(a) and 36, subject to the discretion of the court and THE PRINCIPLES OF EQUITY **if** § 1125(5)(A) the mark or trade name that is likely to cause dilution by blurring or dilution by tarnishment WAS FIRST used in commerce by the person against whom the injunction is sought AFTER THE DATE OF ENACTMENT OF THE TRADEMARK DILUTION REVISION ACT OF 2006; **and**[1], "(B) in a claim arising UNDER THIS SUBSECTION- (again referring to subsection (c) in its entirety). If congress intended it to apply to only that portion of subsection

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[1] (Emphasis added); of importance are the words "if" and "and"

(c) they would have used the term for the purpose of paragraph, or subparagraph. Accordingly, Congress uses the term "Subject To The Principles of Equity" twice in subsection (c) and because of the principles of equity (the cost of litigating, the certainty of the law at that time) it would make sense that claims brought under the FTDA would remain under the FTDA, and claims brought after the revision would be regulated by the TDRA. Congress also logically uses the phrase "commence use." Therefore in keeping with the plain language, every time the word subsection is used, it is used for the entirety of subsection (c). The TDRA was not to be applied to cases prior to its enactment.

The District Court (App., infra, 37a) found no logical reason to differentiate this case from those that were coming back down the appellate ladder as to cases going up the appellate ladder. The Supreme Court in *Ed Plaut v. Spendthrift Farm Inc.*, 514 U.S. 211 (1995) (no. 93-1121), explains that distinction:

> Our decisions stemming from Hayburn's Case--although their precise holdings are not strictly applicable here, see supra, at 6-7--have uniformly provided fair warning that such an act exceeds the powers of Congress. *See, e.g., Chicago & Southern Air Lines, Inc.*, 333 U. S., at 113 ("[J]udgments within the powers vested in courts by the Judiciary Article of the Constitution may not lawfully be revised, overturned or refused faith and credit by another Department of Government"); *United States v. O'Grady*, 22 Wall. 641, 647-648 (1875) ("Judicial jurisdiction implies the power to hear and determine a cause, and . . . Congress cannot subject the judgments of the Supreme Court to

> the re examination and revision of any other tribunal"); *Gordon v. United States*, 117 U.S. 697, 700-704 (opinion of Taney, C. J.) (decided 1864, printed 1885) (judgments of Article III courts are "final and conclusive upon the rights of the parties"); Hayburn's Case, 2 Dall., at 411 (opinion of Wilson and Blair JJ., and Peters, D. J.) ("[R]evision and control" of Article III judgments is "radically inconsistent with the independence of that judicial power which is vested in the courts"); id., at 413 (opinion of Iredell, J., and Sitgreaves, D. J.) ("[N]o decision of any court of the United States can, under any circumstances, . . . be liable to a revision, or even suspension, by the [l]egislature itself, in whom no judicial power of any kind appears to be vested"). *See also Pennsylvania v. Wheeling & Belmont Bridge Co.*, 18 How. 421, 431 (1856) ("[I]t is urged, that the act of congress cannot have the effect and operation to annul the judgment of the court already rendered, or the rights determined thereby . . . . This, as a general proposition, is certainly not to be denied, especially as it respects adjudication upon the private rights of parties. When they have passed into judgment the right becomes absolute, and it is the duty of the court to enforce it"). Today those clear statements must either be honored, or else proved false.

Id. at 226.

The Court goes on to explain that the distinction between judgments from which all appeals have been forgone or completed, and judgments that remain on appeal (or subject to being appealed), is implicit in

what Article III creates: not a batch of unconnected courts, but a judicial department composed of inferior Courts and one supreme Court. Within that hierarchy, the decision of an inferior court is not (unless the time for appeal has expired) the final word of the department as a whole. It is the obligation of the last court in the hierarchy that rules on the case to give effect to Congress's latest enactment, even when that has the effect of overturning the judgment of an inferior court, since each court, at every level, must "decide according to existing laws." *U.S. v. Schooner Peggy*, *supra*, at 109. Having achieved finality, however, a judicial decision becomes the last word of the judicial department with regard to a particular case or controversy, and Congress may not declare by retroactive legislation that the law applicable to that very case was something other than what the courts said it was. Finality of a legal judgment is determined by statute, just as entitlement to a government benefit is a statutory creation; but that no more deprives the former of its constitutional significance for separation of powers analysis than it deprives the latter of its significance for due process purposes. *See, e.g., Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532 (1985); *Meachum v. Fano*, 427 U.S. 215 (1976). Amazingly, on writ from the Sixth Circuit Court, the same court from which Petitioner appeals.

The District Court at (App., 35a n.5) addresses Respondents' theory that the Court of appeals might have held this case to afford Congress the opportunity to supersede the FTDA with new legislation. The Court goes on to say that there is no evidence in the record to support this suggestion and yet the Court suggests in footnote 6, (App., infra, 36a) that Congress amended the FTDA principally to overrule Moseley

and to require that only a likelihood of dilution be proved. The Circuit Court at (App., infra, 4a) comments that The new Act was expressly intended to overrule the Supreme Courts interpretation of the old Act in this very same case. The Circuit Court goes on to say that, "On remand to the District Court from the Supreme Court after the 2003 reversal, no new evidence was introduced, and the District Court reconsidered the case based on the same evidence but used the new language in the new Act WHICH OVERRULES the Supreme Court in this case." We will first brief the Supreme Court opinion and the reasons Congress overruled the Supreme Court in this case. There is no evidence that Congress intended to overrule Moseley and it is apparent the district and circuit court used this reasoning to substantiate their opinions. Congress simply responded to the decision of the Supreme Court by addressing the issues of the FTDA with the amended TDRA.

Law of the Case Doctrine does apply

In considering the Law of the Case Doctrine the Circuit Court reasons (App., infra, 15a) that The Law of the Case Doctrine has no application here to the prospective relief sought because, while the case was "pending" a "controlling authority" (Congress) changed the law, (*United States v. Moored*, 38 F.3d 1419, 1421 (6th Cir. 1994) ("a subsequent contrary view of the law by the controlling authority" in "pending" cases justifies disregarding the Law of the Case Doctrine.) Petitioners respectfully submit that this case was not "PENDING" and the law of the case doctrine applied.

In *Bissell Carpet-Sweeper Co. v. Goshen Sweeper Co.*, 72 F. 545, 548-549 (6th Cir. 1986) the circuit court

addresses this very issue, reasoning that: When a case has been decided by [the appellate] court on appeal, and remanded to the [trial] court, whatever was before [the appellate] court, and disposed of by its decree, is considered as finally settled. The [trial] court is bound by decree as the law of the case, and must carry it into execution according to the mandate. That court cannot vary it, or examine it for any other purpose than execution, or give any other or further relief, or review it, even for apparent error, upon any matter decided on appeal, or intermeddle with it, further than to settle so much as has been remanded.

The District Court, the Circuit Court and the Respondents continually refer and rely on this case as "pending." First we should look at the definition of "pending," unresolved, unsettled, undecided. This case was Decided March 4, 2003 by the U.S. Supreme Court. The highest appellate court. The judgment of the U.S. Supreme Court, ordering cost to be paid to Petitioners was entered on April 3, 2003. Petitioners submit and claim at this point this case became *res judicata*. The appellate process had been exhausted and was on its way back down the appellate ladder. On remand the only thing pending was the action of the Circuit and District Court to do their judicial duty and follow the mandate of the United States Supreme Court. The Circuit Court's failure or refusal to follow the mandate in a reasonable and timely manner does not change the fact that this case was resolved, settled, and decided. Simply put, Petitioners and Respondents both had filed motions for summary judgment, standing on their evidence. The only claim left of Respondents was dilution by tarnishment. All other claims were settled in favor of the Petitioners. The United States Supreme Court settled this last

claim in their decision on March 4, 2003, ruling that there was a complete absence of evidence for Respondents to prove their case. On remand the Supreme Court gave no direction to retry or litigate this case over. The appellate process had been exhausted. Again, the decision of the Supreme Court was final. The Petitioners submit and claim that the principles of *res judicata*, and collateral estoppel are a complete ban against the Respondents to litigate this case again. *See Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 326 (1979), (A), Collateral estoppel, like the related doctrine of *res judicata*, [Footnote 5] has the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation. *Citing Blonder-Tongue Labs., Inc. v. Univ. of Illinois Found.*, 402 U.S. 313, 328-329 (1971). "In any lawsuit where a defendant, because of the mutuality principle, is forced to present a complete defense on the merits to a claim which the plaintiff has fully litigated and lost in a prior action, there is an arguable misallocation of resources. To the extent the defendant in the second suit may not win by asserting, without contradiction, that the plaintiff had fully and fairly, but unsuccessfully, litigated the same claim in the prior suit, the defendant's time and money are diverted from alternative uses -- productive or otherwise to relitigation of a decided issue." *Parklane Hosiery Co., Inc.*, 439 U.S. at 328.

The Respondents originally argued their claim under the FTDA for dilution by tarnishment in the District and Circuit Courts under a "likely-to-cause-dilution" standard. Respondents swapped to a "causes-dilution" standard in the U.S. Supreme Court. Now after the decision of the U.S. Supreme Court in favor

of the Petitioners and the passage of the TDRA, Respondents again pursue the same claim on the same issue; dilution by tarnishment under a "likely-to-cause-dilution" standard again.

The Petitioners used the name Victor's Little Secret in conjunction with their business for almost two years. The Respondents failed to show any harm at all under the FTDA. It is unreasonable now to even presume that simply because the wording changed from "causes" to "likely to cause" that evidence just magically appears.

THE INFERIOR COURTS HAVE SHOWN A COMPLETE BIAS.

Since the inception of this case, the courts have shown a complete bias towards the Petitioners, based merely upon a statement of an army officer, who had never set foot in the Moseley's store to substantiate such a claim, that Petitioners' goods were cheap, tawdry, salacious, and unwholesome. (App., infra, 27a, 32a). There has not been one single shred of evidence introduced in this case to prove such a claim. Other than Respondents' Counsel, Frank Colluci, submitting a misleading and patently false affidavit, and the submission of Mr. Kriss's affidavit[2] declaring V. Secret's fame and store sales, Respondents have not introduced any new evidence to substantiate a claim of

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[2] Mr. Kriss fails to acknowledge the Victoria's Secret store opened in Elizabethtown, Ky. shortly after the Circuit court's denial for a hearing en banc on 10/04/01. This might be due to the fact that during discovery Respondents claimed that they had no plans to open a store in Elizabethtown, Ky.

dilution by tarnishment. The evidence in this case has essentially remained the same since its inception.

A court abuses its discretion when it bases its decision on an erroneous view of the law or a clearly erroneous assessment of the facts. (*United States v. Rahm*, 993 F.2d 1405 (9th Cir. 1993) (12). For expeditious reasons we will start with events after the Supreme Courts ruling in favor of Petitioners in 2003 culminating to this appeal. On remand from the U.S. Supreme Court, Petitioners moved the Sixth Circuit to (1) vacate the injunction entered by the district court under the FTDA; (2) reverse the February 9, 2000 summary judgment of dilution entered by the District Court in favor of Respondents (collectively "Victoria's Secret"); and (3) remand this case to the District Court with instructions to enter judgment for the Petitioner (Moseleys), dismissing the remaining (FTDA dilution) count Victoria's Secret's complaint (R.62-2, Memo. In Support of MSJ, p.3, ROA pldgs. Vol.1, p.22.). The Circuit Court ignored those motions until after the passage of the TDRA. On July 26, 2007, the Circuit Court, without writing an opinion, remanded this case back to the District Court for further proceedings consistent with that of the Supreme Court. The District Court scheduled a pretrial conference for August 23, 2007. After the close of this conference, Judge Simpson requested a conversation with Frank Colucci, (Respondents' Council) in private. At the following pretrial conference on October 22, 2007; in attendance were Victor Moseley, John Spainhour, and Licha Farah for Moseley, and Reford H. Coleman and Frank J. Colucci for V. Secret. Also in attendance by order of Judge Simpson, were Richard P. Schiller, Katherine Zimmer, Noel Halpin, for Grange Insurance Company, in regards to Petitioners' separate suit for

coverage of this case. Counsel for V. Secret withdrew their claims for monetary relief set forth in paragraphs B through E of the prayer for relief of the complaint in this civil action. This resulted in Petitioners' insurance company withdrawing its defense since V. Secret was now only seeking injunctive relief. The Circuit Court erroneously claims Petitioners' use of the word secret in their mark is to make the association with "Victoria's Secret" mark. (App., infra, 13a) That claim has long ago been settled in Petitioners' favor and is false. Respondents' voluntary dismissal of its damage claim reenforces the falsity of that statement (App., infra, 37a). Regardless that discovery ended on April 9, 1999, no request was made by either party to re-open discovery and Respondents had not filed a new claim under the TDRA. The District Court erroneously allowed Respondents to submit exhibits, affidavits of Frank Colucci (counsel for V. Secret), and affidavits of Mr. Kriss. Frank Colucci and Mr. Kriss were never identified as potential witnesses. Mr. Kriss was not employed by the Respondents until 2005, yet the District Court seems to put full weight behind his affidavits. Rule 56(f) does not contemplate permitting Respondents further discovery in this case.

Although Petitioners objected, the Circuit Court never addressed this issue. Further, both courts have consistently and erroneously referred to the adult nature of the Petitioners' goods as reason to grant an injunction with no evidence that Petitioners are likely to cause harm to Respondents' mark. The use of the remarkably similar "Victor's Secret" or "Victor's Little Secret" in connection with the sale of intimate lingerie along with sex toys and adult videos tarnishes the reputation of the Victoria's Secret mark. (App., infra, 65a). A famous mark is tarnished when its mark is

semantically associated with a new mark that is used to sell sex-related products (App., infra, 11a).

Interestingly, relying on a declaration of Kriss (App., infra, 64a, 65a) that V. Secret scrupulously avoids sexually explicit goods while cultivating a "sexy and playful" image contradicts their reliance on sex-related products. The definitions of sexy are arousing, or tending to arouse sexual desire, arousing sexual desire, see obscene, salacious, suggestive. In fact, the statement of Mr. Kriss is totally false. One only has to watch the news to see statements like the following.[3] Robert Knight, director of CWA'S Culture and Family Institute said "Victoria's Secret has crossed the line with its TV infomercial and its pornographic mall posters." FCC commissioner, Michael Copps said of Victoria's Secret fashion show, "We are deeply regretful for allowing such prurient programming to air." Surely since Respondents are so famous, the District and Circuit Courts are not so disenfranchised that they were not aware of Respondents' salacious reputation. Petitioners have never questioned Victoria's Secret fame but one only has to open one's eyes to see that that fame is predicated on the sale of sex-y related products. It would be hard to tarnish a reputation already tarnished. There is clearly a strong inference of intermeddling, and an overzealous desire, of the inferior courts, to rule in favor of Respondents.

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[3] http://www.cultureandfamily.org/articledisplay.asp?id=310&department=CFI&categoryid=cfreport

HOW DIFFERENT IS DIFFERENT ENOUGH?

Since the inception of this case in 1998 Petitioners have held that their trademark Victor's Secret, Victor's Little Secret is totally different than Respondents' Victoria's Secret. Yet, none of the Courts have answered question 3 above. It remains a guessing game when it comes to semantic similarities as to what is actionable under the TDRA and what is not.

Petitioners agree that there is a semantic similarity in the spelling of Victor's and Victoria's and that the word "secret" is the same as used in Respondents' mark. But Petitioners contend that both marks taken as a whole, Victor's Little Secret with a pair of pursed lips and a hand with a finger over those lips, and their motto "Everything For Romantic Encounters" underneath, appears and looks nothing like Respondents' plain Victoria's Secret mark and evokes a totally different image. Petitioners also contend that the font is different, and just because it is printed, semantics should not play as a factor. If it did, how many marks would have a semantic similarity, and would that be actionable under the TDRA? Of course not. Petitioners also contend that a famous mark can not hold a patent, trademark, or copyright to a word commonly used. At this time Petitioners are not questioning the constitutionality of the TDRA, but this court could take the opportunity to bring clarity as to semantic similarities, saving many judicial hours in future litigation. Examples would be if Vincent, Vittirow, Valorie, Vicky etc. used their first name in conjunction with the word "secret" to name their lingerie store, should that be anymore actionable than Cathy's, Joe's, Sherry's etc.? If so, then Vincent, Vittirow, Valorie, and Vicky, as in this case, are being

denied the right to use the word "secret," simply because of what their parents chose to name them. Trademarks must be taken as a whole, not broken into words, or based on semantic similarities. It should not be asked of a judge to be a fortune teller as to what is likely or unlikely to happen. Semantic similarities can be as similar or as dissimilar, depending on the eyes of the beholder.

CONCLUSION

It is very apparent that both the District and Circuit Court of appeals are clearly prejudiced against Petitioners merchandise and business. The inferior courts in four separate opinions have moralized and subjectively (without a developed record) considered Petitioners' goods as the reason to grant or uphold an injunction against Petitioners with absolutely no probative evidence that Petitioners' use of their business name, in the plain language of the TDRA, "harms the reputation of the famous mark." Clearly the objective standard applied by the Second, Fourth, and Seventh Circuit Court of Appeals follows the statutory language of the TDRA. Nowhere in the language of the revisions that Congress made to the FTDA, including the legislative history, is there an inkling or suggestion that the TDRA forms a rebuttable presumption. Again, as in Petitioners' prior conclusion, this subjective standard is precisely the type of outcome-based jurisprudence which federal statutes are supposed to avoid. The misinterpretations of the FTDA, and the TDRA, have forced Petitioners to defend themselves for over twelve years. Petitioners hope that their pain has been instrumental in helping other small businesses survive these types of claims. Petitioners assert and claim that this case under the

FTDA ended after the decision of this Court in 2003. If not for the ill founded and over zealous determination of the inferior courts to erroneously overrule Petitioners, Petitioners would not require the service of this Court again. Petitioners hope that in the name of justice, fairness to future litigants of the TDRA, and for all the reasons above, this Writ of Certiorari should be granted.

Respectfully Submitted,

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